FILED
SEP 15 1953
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 344

JOHN ARBULICH, JR.,

Petitioner,

vs.

THOMAS ARBULICH

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND BRIEF IN SUPPORT THEREOF.

LAWRENCE S. LESSER,
SIDNEY H. WILLNER,
PETER A. SCHWABE,
EMMET B. HAYES,
Counsel for Petitioner.

INDEX

Subject Index

Petition for Writ of Certiorari:

	Page
Opinions Below	1
Jurisdiction	2
Statute and Treaties Involved	2
Matters Involved	3
Specification of Errors	5
Questions Presented	6
Statement Under Rule 12, Paragraph 1	8
Reasons for Granting the Writ	9

Brief in Support of Petition for Writ of Certiorari:

Point I:
The State Court was required to inquire into and give effect to rights of inheritance granted by the Convention 13

Point II:
The Convention taken in conjunction with treaties of the United States with other nations grants Yugoslav citizens full rights of inheritance in the United States. 14

Point III:
The reciprocal obligation of Yugoslavia under the Convention is to grant "most favored nation" treatment, which it has done 15

Point IV:
Even if, to claim the rights granted by the United States to citizens of its most favored nation, Yugoslavia is required to grant treatment equal to that granted by the same most favored nation to United States citizens, such rights have been granted by reason of Yugoslavia's treaties with its most favored nation..... 16

Page

Point V:
The Convention applies to the enjoyment of inheritance rights in the United States and Yugoslavia by all Yugoslav and United States citizens, respectively 17

Point VI:
The State Courts were required to accept the statement of qualified Yugoslav officials as to the Yugoslav law, particularly in the absence of any expert testimony contradicting it 18

Point VII:
The public policy of the state of California must yield to the public policy of the nation in matters of international relations and *a fortiori* where the state legislature has deferred to the national public policy the state courts may not refuse to do likewise 19

APPENDICES TO THE PETITION 23-30

TABLE OF AUTHORITIES CITED

CASES:

Clark v. *Allen*, 331 U.S. 503 (1947) 14, 18, 22
Department of Banking v. *Pink*, 317 U.S. 264 (1942) 2
Factor v. *Laubenheimer*, 290 U.S. 276 (1933) 15, 16
Hauenstein v. *Lynham*, 100 U.S. 483 (1880) 17
Hines v. *Davidowitz*, 312 U.S. 52 (1941) 14
In re Zalewski's Estate, 292 N.Y. 332, 55 N.E. 2d 184 (1944) 17
Jones v. *United States*, 137 U.S. 202 (1890) 14
Munich Reinsurance Co. v. *First Reinsurance Co.*, 6 F. 2d 742 (2d Cir. 1925) 14
Nielsen v. *Johnson*, 279 U.S. 47 (1929) .....
Perutz v. *Bohemian Discount Bank in Liquidation*, 304 N.Y. 533, 110 N.E. 2d 6 (1953) .....
Santovincenzo v. *Egan*, 284 U.S. 30 (1931) ... 14, 15, 16
Todok v. *Union State Bank of Harvard*, 281 U.S. 449 (1930) 14

Page

United States v. *Belmont*, 301 U.S. 324 (1937) .. 14, 21
United States v. *Percheman*, 7 Pet. (32 U.S.) 51 (1833) 17
United States v. *Pink*, 315 U.S. 203 (1942) 18, 19
United States ex rel. Reichel v. *Carusi*, 157 F. 2d 732 (3rd Cir. 1946) 16
United States v. *Reynes*, 9 How. (50 U.S.) 127 (1850) 14, 16
Ware v. *Hylton*, 3 Dall. (3 U.S.) 199 (1796) 14

CONSTITUTION:

Article 6, Clause 2 14

STATUTES & TREATIES:

10 STAT. 1005; 18 STAT. (pt. 2, Public Treaties) 16 (Argentine Treaty) 2, 14, 25
22 STAT. 963 (Serbian Treaty) 2, 23
33 STAT. 2105 (Spanish Treaty) 2, 14, 24
59 STAT. 512 (International Monetary Fund Agreement) 2-3, 20-21, 28-29
62 STAT. 2133 (Claims Settlement Agreement of 1948) 2, 18, 27
85 League of Nations Treaty Series 455 (Polish-Yugoslav Treaty) 2, 16, 26
28 U.S.C. § 1257 2
§ 259, California Probate Code 3, 4, 21-22, 30

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 344

JOHN ARBULICH, JR.,

Petitioner,

against

THOMAS ARBULICH

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of California:

The undersigned, on behalf of the above-named petitioner, pray that a writ of certiorari issue to review a final decree of the Supreme Court of the State of California rendered against petitioner on May 25, 1953 in the case docketed in that Court as S.F. No. 18194.

Opinions Below

The majority opinion of the California Supreme Court is reported at 41 A.C. 85 and 257 P. 2d 433. The opinion of the California District Court of Appeal, which was reported in 113 A.C.A. 2[illegible] was adopted as the opinion of the dissenting judge of the Supreme Court and is thus also reported at 41

A.C. 96, 257 P. 2d. 440. The Memorandum Opinion of the California Superior Court is unreported.

Jurisdiction

The decree of the California Supreme Court was entered May 25, 1953. A petition for rehearing, seasonably filed, was denied by that Court on June 18, 1953, two judges dissenting. (R. p. 228.) This petition for a writ of certiorari is filed before September 16, 1953. See *Department of Banking* v. *Pink*, 317 U. S. 264 (1942).

The jurisdiction of this Court is invoked under the Act of June 25, 1948, 52 STAT. 929, c. 646, 28 U.S.C. § 1257.

Treaties, Agreements and Statute Involved

The treaties and agreements involved are:

(1) The Convention of Commerce and Navigation of 1881 between the United States and the Prince of Serbia (hereinafter referred to as the Convention) (22 STAT. 963) and particularly Article II thereof, the English text of which is printed in Appendix A, *infra;*

(2) The Treaty of Friendship and General Relations between the United States and Spain (33 STAT. 2105) and the Treaty of Friendship, Commerce and Navigation between the United States and Argentina (10 STAT. 1005; 18 STAT. (pt. 2, Public Treaties) 16), and particularly Article III of the former and Article IX of the latter, the English texts of which are printed as Appendix B, *infra;*

(3) The Treaty of 1923 between Yugoslavia and Poland (85 League of Nations Treaty Series 455), the pertinent provision of which, in English translation, is printed in Appendix C, *infra;*

(4) The Agreement of July 19, 1948 between the United States and the Federal Peoples Republic of Yugoslavia regarding pecuniary claims of the United States and its nationals (62 STAT. 2133), and particularly Article V thereof, which is printed in Appendix D, *infra;*

(5) The Bretton Woods Agreement for the creation

of the International Monetary Fund (59 STAT. 512) to which both the United States and Yugoslavia are parties, and particularly Article VIII, section 2, Article XIV, sections 2 and 4 and Article XV, section 2(a) of said agreement, which are printed in Appendix E, *infra.*

The statutory provision involved is section 259 of the California Probate Code (ANN. STATS. 1945, Ch. 1160), a copy of which is printed in Appendix F, *infra,* as it read on March 21, 1947, the date of decedent's death.

Matters Involved

The proceeding herein originated from petitions to determine heirship filed in the Superior Court of the City and County of San Francisco. The decedent, Charles J. Arbulich, a naturalized citizen of the United States, died testate in the city and county of San Francisco, California. His will provided in pertinent part

> "*Third:* I leave all of my estate both real and personal and wherever situate to my father John Arbulich, residing in Yugoslavia, and should he die before me then I leave all of my estate both real and personal and wherever situate to my brother John Arbulich, Jr. residing in Yugoslavia."

John Arbulich, decedent's father, predeceased him. John Arbulich, Jr., (hereinafter referred to as petitioner), a citizen and resident of Yugoslavia, claimed under the will through V. M. Vukmirowich, Consul General of the Federal Peoples Republic of Yugoslavia. The will disinherited Thomas Arbulich (hereinafter referred to as respondent) who was decedent's other surviving brother and a citizen and resident of California. (R. pp. 9-11.) Respondent, however, claimed the inheritance on the ground that despite the provisions of the will, petitioner was not entitled to inherit under California law (R. pp. 3, 4).

The Superior Court denied petitioner's right to inherit and awarded the estate to respondent on the ground, among others, that as a citizen and resident of a foreign country, petitioner's right to inherit was dependent upon a finding of "reciprocity" in accordance with Section 259 of the California Probate Code, and that in the case of Yugoslavia "reciprocity does not exist *de jure* or *de facto*." (R. pp. 9, 12.) On appeal to the District Court of Appeal, the judgment was reversed, on the ground that the trial court relied on irrelevant and incompetent evidence and upon factors irrelevant to the issues, including the trial judge's personal views concerning the form of government prevailing in Yugoslavia. (R. pp. 141-163.) Thereafter, with one judge dissenting, the California Supreme Court reversed the District Court of Appeal and affirmed the decree of the Superior Court. (R. pp. 172-183.) The dissenting judge adopted in full the opinion of the District Court of Appeal. (R. pp. 183-205.)

The California Supreme Court held that "reciprocity" within the meaning of section 259 of the California Probate Code was required; that the existence of reciprocity was a question of fact on which the Superior Court's findings must be upheld if supported by substantial evidence; and that there was substantial evidence to support the finding of lack of reciprocity. It relied, as to real property, primarily on provisions of the Yugoslav Constitution as to nationalization and the decree of July 16, 1946 relating to acquisitions of real property by foreigners, and, as to personalty, wholly on a law of October 23, 1946 prohibiting unlicensed transfers of foreign exchange.

After expressing doubts as to applicability of the Convention because of the fact that petitioner was a resident of Yugoslavia, the Court denied its relevance to petitioner's right to inherit on the ground that

"the rights granted are only those given by each of the contracting nations 'to the subjects of the most favoured nation,' and do not purport to equal the rights given or guaranteed by each of the contracting nations to *its own* citizens. Consequently the treaty provisions do not establish the reciprocal rights required by the Probate Code". See 41 A. C. at p. 92, 257 P. 2d at 437. (R. p. 178.)

Specification of Errors

The California Supreme Court erred:

1. In failing to give effect to the rights of inheritance granted by the Convention on the ground that that treaty did not satisfy the requirements of the local probate code, thus in effect refusing to recognize the supremacy of treaties of the United States over state laws as required by Article VI, Clause 2 of the Constitution of the United States and denying a right claimed under a treaty of the United States.

2. In failing to hold that the Convention granting rights to Yugoslav citizens to inherit on a "most favored nation" basis, taken in conjunction with other treaties entered into by the United States, confers a right on the part of Yugoslav citizens to inherit both personalty and realty in the United States which may not be abridged by state action.

3. In failing to hold that the only reciprocity required by the Convention is that the parties respectively accord each other "most favored nation" treatment and that there is no claim, or basis in the record for a claim, that Yugoslavia has not afforded United States citizens such treatment.

4. In failing to hold, even on the assumption that Yugoslavia must grant United States citizenship rights of inheritance equal to those granted them by the United States' most favored nation, in order to claim under the Convention, that Yugoslavia *has* granted such rights by reason of its treaty with *its* most favored nation; and that the obligations of the United States under the

Convention may not be abrogated by the courts on the basis of any claimed failure of Yugoslavia to fulfill its obligations thereunder when the executive branch of the Federal Government has not denounced the Convention but rather has expressly confirmed its continuing existence and validity.

5. In holding, insofar as it may be considered to have so held, that the Convention is applicable only to Yugoslav citizens within the United States.

6. In holding that the trial court properly found as a fact that the Yugoslav Decree of July 16, 1946 barred inheritance of real property in Yugoslavia by United States citizens in the face of uncontradicted evidence, in the form of testimony by the Yugoslav Ambassador to the United States, and certified official statements of the Minister of Justice of Yugoslavia and of the Yugoslav Ambassador, that neither the said decree nor any other action of the Yugoslav Government would or could have, or had had, such effect, since Yugoslavia interpreted the Convention as being paramount and as prohibiting it.

7. In holding that effect could be given to Yugoslav foreign exchange restrictions as a ground for refusing to permit inheritance by Yugoslav citizens in the face of the specific recognition of the propriety of such foreign exchange restrictions in the treaty creating the International Monetary Fund, to which both the United States and Yugoslavia are parties, and of the repeal of the California Code provision permitting denial of inheritance on such grounds which was enacted after, and in the light of, the said Agreement.

8. In affirming the judgment of the Superior Court.

Questions Presented

1. May a state court refuse to respect rights of inheritance granted by a treaty between the United States and a foreign nation on the ground that the treaty does not satisfy the requirements of the probate law of the state?

2. Does the Convention in guaranteeing citizens of Yugoslavia rights of inheritance equal to those accorded subjects

of the most favored nation grant a right of inheritance of property in the United States to Yugoslav citizens, in view of other subsisting treaties of the United States?

3. May a Yugoslav citizen's right of inheritance under the Convention be denied on the ground that Yugoslavia does not accord unrestricted rights of inheritance to citizens of the United States, where the only requirement of the Convention is that Yugoslavia grant "most favored nation treatment" to citizens of the United States, and there is no claim or showing that Yugoslavia does not grant to citizens of the United States rights of inheritance as favorable as those granted to citizens of any other nation?

4. Since, irrespective of the answer to 3 above, Yugoslavia must under the Convention accord United States citizens most favored nation treatment, and since Yugoslavia's treaty with its most favored nation confers upon that nation's citizens rights of inheritance as great as those accorded to citizens of the United States by the United States' most favored nation and equal to the rights granted Yugoslav citizens, may a state court refuse to fulfill the United States' obligation under the Convention to permit inheritance on the basis of any claimed failure by Yugoslavia to fulfill its obligations under the same Convention, in the absence of a denunciation of the Convention by the Executive Arm of the Federal Government and, indeed, in the face of an express affirmance of the Convention's continuing existence and validity by the Secretary of State of the United States?

5. Does the Convention apply to inheritance of property in the United States and Yugoslavia by all citizens of those nations respectively, or is it restricted in its application to citizens of one who happen to be within the geographical limits of the other sovereign?

6. Assuming that the state court was justified in passing

upon the question of the existence of reciprocity as an issue of fact, may it properly rest a finding of non-reciprocity on the existence of decrees which the official representatives of Yugoslavia have declared and testified are subordinate to the obligation to afford full inheritance rights which Yugoslavia has consistently assumed to be imposed by the Convention, particularly in the absence of any competent evidence contradicting such official declarations and testimony?

7. May a state court properly base a denial of rights of inheritance by citizens and residents of a foreign country on the existence of transitional foreign exchange controls, recognized to be wholly proper and in accord with national public policy in an international agreement, entered into with express congressional sanction, which provides a comprehensive system for dealing with problems of foreign exchange regulation, particularly where the legislature of the state, shortly after entrance into said International Agreement was authorized by Congress, expressly repealed legislation making existence of foreign exchange controls a basis for denying rights of inheritance?

Statement Under Rule 12, Paragraph 1

The Convention was introduced into the record and read into evidence at the trial (R. pp. 30-31, 55) with considerable difficulty, since the Court indicated it had little interest in the rights granted by it, repeatedly stating that its preoccupation was with the right of the Consul General to act for the petitioner (R. pp. 28, 29, 42-45, 47-55, 91-92, 94-95), and with the communistic nature of the Government of Yugoslavia (R. pp. 28, 30, 37, 46, 52, 58, 92, 94, 104-105, 108-109), and whether petitioner would really get his inheritance if it was ordered paid over to him (R. pp. 46-47, 52, 93-95, 104-105, 115). These were indeed the grounds,

other than reciprocity under the Probate Code, on which the trial court's decision was based. These rulings, (R. pp. 8-9, 12), however, were reversed by the District Court of Appeal and were not relied upon as grounds of decision by the California Supreme Court.

On appeal to the District Court of Appeal, petitioner in his brief (R. pp. 117-125) called the court's attention to the Convention, and to treaties of both the United States and Yugoslavia with other nations made relevant by the "most favored nation" provision of the Convention. He urged the supremacy of the Convention and that "the requirements of Probate Code Section 259 must 'give way' and cannot be asserted against the rights of inheritance of heirs or beneficiaries in Yugoslavia" (R. pp. 124-125). In view of the grounds of the District Court of Appeal's opinion, the discussion of these questions was much more abbreviated in petitioner's brief before the California Supreme Court but, as is evidenced by its opinion, the existence and terms of the Convention were squarely before that Court. In his petition for rehearing to the California Supreme Court, petitioner pointed out that the court had so construed the Convention as to deprive it of any effect (R. pp. 219-220). He also pointed out the inconsistency of the court's ruling on foreign exchange restrictions with the Bretton Woods Agreement (R. pp. 217-219) and that the court was substituting its own judgment as to the Yugoslav law for that of the officials of that country, whose testimony was uncontradicted (R. p. 212).

Reasons for Granting the Writ

The questions raised herein are substantial and of national importance, both in their inherent general significance and in their specific practical impact on the foreign relations of the United States.

An examination of the specifications of error and of the questions presented demonstrates in itself, we believe, the intrinsic importance of the issues raised. A ruling by the Supreme Court of a state that it may in effect ignore rights derived from a treaty on the ground that the treaty fails to satisfy local requirements is as clearly far reaching in its potential mischief as it is obviously erroneous. The other questions raised concerning the construction of the Convention, as, for example, the nature of the obligation imposed on each of the parties as the price of receiving the promised "most favored nation" treatment from the other, and the power of the courts to go behind the obligation of the other contracting party to its performance, are clearly also of far-reaching significance.

Of possibly equal national and international importance are the issues raised wholly apart from the Convention itself; how far a state court may ignore official declarations and testimony of qualified officials of a foreign government as to how it construes its own laws, particularly in the absence of any contrary testimony, expert or otherwise; and how far a state court may go in imposing a punitive denial of transfer of inherited funds because of the existence of foreign exchange regulations which the United States Government has recognized in an international agreement as proper and even necessary in the circumstances, and which, in accordance with such international agreement, have been imposed by almost all other foreign governments (including many not so penalized by the state court, on some basis of distinction in no way explained by the court); particularly when the State legislature specifically abandoned such a local policy in apparent deference to the national policy expressed in the International Agreement.

As to the specific significance of the matter, it should be

noted that four other states, to wit, Oregon, Montana, Nevada and Arizona, have already enacted so-called reciprocal rights inheritance statutes similar to that of California, and at least two others, Oklahoma and Texas, have statutory provisions which may raise similar problems. The final decision in the present case has been generally looked to as providing the key to the treatment of a great number of estates involving similar issues in those states as well as in California. Thus an undeterminable, but extremely large number of cases will be affected by the final decision herein. In addition, little need be said about the potential cumulative impact of such cases on the relations of the United States with Yugoslavia. This aspect of the problem in itself furnishes an impelling reason for a thorough review by this Court of the many substantive issues herein.

Wherefore, it is respectfully submitted that the petition should be granted.

LAWRENCE S. LESSER,
SIDNEY H. WILLNER,
PETER A. SCHWABE,
EMMET B. HAYES,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 344

JOHN ARBULICH, JR.,

Petitioner,

vs.

THOMAS ARBULICH

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

For statement of the case, statements as to the opinions below, jurisdiction, questions presented, statutes and treaties involved, and for specification of errors, we refer to the foregoing petition.

We shall abstain from full discussion of the merits at this time, limiting ourselves to as brief a statement as possible, designed solely to demonstrate the substantiality of each of the questions presented.

POINT I

The State Court Was Required to Inquire Into and Give Effect to Rights of Inheritance Granted by the Convention.

It is settled beyond possibility of doubt that where rights granted by treaties are inconsistent with state law, the supremacy of the treaties requires that such rights be re-

spected. Constitution, Article 6, Clause 2; *Ware* v. *Hylton*, 3 Dall. (3 U.S.) 199 (1796); *Santovincenzo* v. *Egan*, 284 U.S. 30 (1931); *United States* v. *Belmont*, 301 U.S. 324 (1937); *Hines* v. *Davidowitz*, 312 U.S. 52 (1941). Indeed this principle has been applied to limit the application of the very California statute here involved, *Clark* v. *Allen*, 331 U.S. 503 (1947). Cf. *Todok* v. *Union State Bank of Harvard*, 281 U.S. 449 (1930).

Point II

The Convention Taken in Conjunction With Treaties of the United States With Other Nations Grants Yugoslav Citizens Full Rights of Inheritance in the United States.

The rights created in Yugoslav citizens by the most favored nation provision of the Convention can only, and must, be construed together with other treaties of the United States involving the same subject matter. See *Santovincenzo* v. *Egan, supra.* Two such treaties are the Treaty with Spain and the Treaty with Argentina printed in Appendix B, of which judicial notice may be taken. 33 STAT. 2105; 10 STAT. 1005, 18 STAT. (pt. 2, Public Treaties) 16; *United States* v. *Reynes*, 9 How. (50 U.S.) 127 (1850); *Jones* v. *United States*, 137 U. S. 202 (1890); *Munich Reinsurance Co.* v. *First Reinsurance Co.*, 6 F. 2d 742 (2d Cir. 1925). These treaties clearly give Spanish and Argentine subjects and citizens, respectively, the right to receive the benefit of inheritances from citizens of the United States of property within the United States. (The question of the necessity for disposition of realty and its conversion into cash does not arise in this case.) The "most favored nation" provision of the Convention would thus give Yugoslav citizens a treaty right to inherit which may not be infringed by state action.

Point III

The Reciprocal Obligation of Yugoslavia under the Convention Is to Grant "Most Favored Nation" Treatment, Which It Has Done.

The Convention provides that each nation shall grant citizens of the other rights equal to those it grants citizens of its most favored nation. There is no requirement—indeed the language used would seem to repel the implication—that the rights granted by each to its most favored nation be identical so as to afford complete reciprocity. The Yugoslav laws and decrees relied upon by the California Supreme Court on their face reveal that, at worst, United States citizens are not discriminated against, but receive treatment equivalent to that accorded citizens of Yugoslavia's most favored nation. This would appear to satisfy the Yugoslav obligation under the Convention, even if performance of its obligation, as distinguished from the obligation itself, were relevant. See *Factor* v. *Laubenheimer,* 290 U.S. 276 (1933) discussed more fully in this regard in Point IV, *infra.*

We have to date found no case dealing squarely with the constructional problem here presented. It should be pointed out that in *Santovincenzo* v. *Egan, supra,* the Court assumed without discussion that full reciprocity was required in a parallel situation. Since it found reciprocity to exist, however, this element was not necessary to its decision and it was expressly treated, as indicated, as an assumption. By reason of the fact that, as set forth in Point IV, *infra,* full reciprocity exists in the present case also, the Court may ultimately decide to pass the issue here as well. Since, however, we feel the question is challenging and important as well as clearly substantial and since its answer may make resolution of the issue of full reciprocity unnecessary, we have considered it proper and, indeed, necessary to present it.

Point IV

Even If, to Claim the Rights Granted by the United States to Citizens of Its Most Favored Nation, Yugoslavia Is Required to Grant Treatment Equal to That Granted by the Same Most Favored Nation to United States Citizens, Such Rights Have Been Granted by Reason of Yugoslavia's Treaties With Its Most Favored Nation.

The obligations of Yugoslavia under the Convention, like those of the United States, are determined by its treaties with other nations. Appended hereto, as Appendix C, is the Treaty of 1923 between Yugoslavia and Poland. 85 League of Nations Treaty Series 455. Judicial notice may be taken of such treaties. *United States* v. *Reynes, supra; United States ex rel. Reichel* v. *Carusi*, 157 F. 2d 732 (3rd Cir. 1946) *cert. denied* 330 U.S. 842 (1946). From this treaty, it clearly appears that Yugoslavia is obligated by the most favored nation clause of the Convention to afford full rights of inheritance to United States citizens. Thus even if, as in *Santovincenzo* v. *Egan, supra,* it is assumed that full reciprocity of obligation is necessary, such reciprocity of obligation exists. Once these reciprocal obligations are established, the Courts may not go behind them to determine whether they have been violated. As was said by the Court in *Factor* v. *Laubenheimer, supra:*

> "* * * the failure of Great Britain to comply with the obligations of the treaty would not be ground for refusal by this government to honor them or by this Court to apply them. Until a treaty has been denounced, it is the duty of both the government and the courts to sanction the performance of the obligations reciprocal to the rights which the treaty declares and the government asserts even though the other party to it holds to a different view of its meaning. *Charlton* v. *Kelly, supra* (229 U.S. 472, 473 * * *)." 290 U.S. at 298.

The present case would appear to present an *a fortiori* situation, since the Government of Yugoslavia at least professes to interpret its obligations under the Convention as requiring it to grant full rights of inheritance.

Point V

The Convention Applies to the Enjoyment of Inheritance Rights in the United States and Yugoslavia by All Yugoslav and United States Citizens, Respectively.

The issue as to the coverage of the Convention revolves around the question of whether the words "in Serbia" and "in the United States" should be construed as constituting adjectival or adverbial phrases. As the Court said in *Hauenstein* v. *Lynham*, 100 U.S. 483 (1880),

> "Where a treaty admits of two constructions, one restrictive as to the rights, that may be claimed under it, and the other liberal, the latter is to be preferred. *Shanks* v. *Dupont* 3 Pet. 242. Such is the settled rule in this court."

Furthermore, it is clear from the record that the Yugoslav government, presumably relying on the Serbian text of the Convention, which is equally authoritative with the English, has considered it applicable to all American citizens, wherever resident (R. pp. 99-102). It is a cardinal principle of construction that where there are two texts equally original and authentic that construction should be adopted which brings them into harmony. *United States* v. *Percheman*, 7 Pet. (32 U. S.) 51 (1993). See also *In re Zalewski's Estate*, 292 N.Y. 332, 55 N.E. 2d 184 (1944).

In addition, without attempting to elaborate the points herein, the correctness of this construction follows from the fact that the restrictive interpretation would rob the convention provision of all meaning, in view of the consti-

tutional protection afforded, without it, to resident aliens, and the fact that the parties have consistently construed the provision as being applicable to all Yugoslav and United States citizens, respectively. See, e.g., Article V of the Agreement between Yugoslavia and the United States printed in Appendix D to the petition.

Again without fully arguing the point, it should be noted that the liberal construction in the present case would be thoroughly consistent with the decision of this Court in *Clark* v. *Allen, supra.* In that case, the Court noted that the history of the origin of the treaty provisions concerning inheritance there involved, then presented to it for the first time, appeared to support the liberal construction. The Court deemed it inappropriate to reverse its consistent line of decisions to the contrary, however, in view of the fact that it felt the State Department must be considered to have been aware of those decisions when it drafted the German treaty then before the Court. In the present case, totally different language is involved, so that full effect can be given to the purpose of the treaty, as indicated not only by the general history presented to the Court in *Clark* v. *Allen,* but by the specific indications of its construction noted above.

Point VI

The State Courts Were Required to Accept the Statements of Qualified Yugoslav Officials as to the Yugoslav Law, Particularly in the Absence of Any Expert Testimony Contradicting It.

In *United States* v. *Pink,* 315 U.S. 203 (1942) this Court held at p. 220:

> "The referee in the Moscow F. Ins. Co. Case found, and the evidence supported his finding, that the Com-

missariat for Justice has power to interpret existing Russian law. That being true this official declaration is conclusive so far as the intended extraterritorial effect of the Russian decree is concerned."

In the present case, there is in the record an opinion of the Yugoslav Minister of Justice (Petitioner's Exhibit 6) as well as two certificates (Petitioner's Exhibits 3 and 4) and the direct testimony of the Yugoslav Ambassador to the United States (R. pp. 99-100) that by reason of the Yugoslav interpretation of the Convention, citizens of the United States are, and must be, allowed full rights of inheritance in Yugoslavia. In spite of this, the California Supreme Court, without benefit of any expert testimony, itself construed the Yugoslav decrees and then assumed without more that such decrees as so construed would prevail over the treaty obligations, as a matter of Yugoslav law. As in the *Pink* case, *supra,* such a state court ruling is clearly improper and may be reviewed by this Court.

Point VII

The Public Policy of the State of California Must Yield to the Public Policy of the Nation in Matters of International Relations and a Fortiori Where the State Legislature Has Deferred to the National Public Policy the State Courts May Not Refuse to Do Likewise.

In *United States* v. *Pink, supra,* this Court held that:

"The action of New York in this case amounts in substance to a rejection of a part of the policy underlying recognition by this nation of Soviet Russia. Such power is not accorded a State in our constitutional system. To permit it would be to sanction a dangerous invasion of Federal authority. For it would 'imperil the amicable relations between governments and vex the peace of nations.' *Oetjen* v. *Central Leather Co.*

supra (246 U.S. p. 304, 62 L. Ed. 733, 38 S. Ct. 309). It would tend to disturb that equilibrium in our foreign relations which the political departments of our national government had diligently endeavored to establish.

"We repeat that there are limitations on the sovereignty of the States. No state can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry, when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts. For such reasons, Mr. Justice Sutherland stated in *United States* v. *Belmont, supra* (301 U.S. p. 331, 81 L. Ed. 1139, 57 S. Ct. 758), 'In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist.'"

We believe that precis[illegible] in this case. In the Inter[illegible]ions Monetary Fund Agreement which was entered in[illegible]e President with the express sanction of Congress, th[illegible]mber nations, including the United States, created a comprehensive system of dealing with the manifold, difficult, and delicate problems of foreign exchange and restrictions on foreign exchange. Sanctions are provided for the imposition of foreign exchange restrictions contrary to the provisions of the Agreement. See Article XIV, section 4 and Article XV, section 2, printed in Appendix E to the petition herein. At the same time, express recognition and approval is given to the maintenance of restrictions in the post-war transitional period for the purpose of permitting the internal financial

POOR COP

rehabilitation of the member countries, Article XIV, section 2. No question was ever raised by the fund or other member countries as to the propriety of the exchange restrictions imposed by Yugoslavia, one of the nations hardest hit by the war and barely beginning to get its internal house in order in 1947, the date of reference in this case. Granted the right of the states to control inheritances, to permit such control to be based upon the expression of a local policy in direct conflict with the policy of the Federal Government as expressed in an international compact would in the words of Mr. Madison in the Virginia Convention (3 Elliot, Debates 515) quoted by Mr. Justice Sutherland in the *Belmont* case, *supra*, (301 U.S. at 331) "bring on the Union the just charge of national perfidy * * *".

The applicability of the above rulings to the type of situation here presented was squarely recognized by the Court of Appeals of the State of New York in *Perutz* v. *Bohemian Discount Bank in Liquidation*, 304 N.Y. 533, 110 N.E. 2d 6 (1953). In that case the Court disposed of the contentions that the Czechoslovakian currency control laws [illegible] contrary to the public policy of the state, saying of the [illegible]

> "* * * But the Czechoslovakian currency control laws in question cannot here be deemed to be offensive on that score, since our Federal Government and the Czechoslovakian Government are members of the International Monetary Fund established by the Bretton Woods Agreements Act. See U.S.C.A. tit. 22, sec. 286; *United States v. Pink*, 315 U.S. 203, 231, 62 S. Ct. 552, 86 L. Ed. 796." 110 N.E. 2d at 7.

The State of California apparently recognized the force of the above considerations when in September 1945, two months after adoption of the Bretton Woods Act by Congress, it expressly repealed the provision of Section 259 of

OPY

the California Probate Code, which had included in the required reciprocity the right to receive payment in the United States. See *Clark* v. *Allen*, supra, p. 506, n. 1. This Court, of course, has no concern with the invalidity of the action of the California Court under California Law. The action of the California legislature does, however, serve to emphasize what would be clear in any event, the impropriety and invalidity of the action of the Court under the laws of the United States.

It should be noted that this Point and the preceding Point VI raise substantial Federal questions decisive of the present case irrespective of the applicability of the Convention and the rights granted thereunder.

Respectfully submitted,

LAWRENCE S. LESSER,
SIDNEY H. WILLNER,
PETER A. SCHWABE,
EMMET B. HAYES,
Attorneys for Petitioner.

APPENDIX A

Article II of the Convention of Commerce and Navigation between the United States and the Prince of Serbia, signed at Belgrade October 2/14, 1881.

22 STAT. 963
Treaty Series 319
II Treaties (Malloy) 1613

"In all that concerns the right of acquiring, or possessing or disposing of every kind of property, real or personal, citizens of the United States in Serbia and Serbian subjects in the United States, shall enjoy the rights which the respective laws grant or shall grant in each of these states to the subjects of the most favored nation.

"Within these limits, and under the same conditions as the subjects of the most favored nation, they shall be at liberty to acquire and dispose of such property, whether by purchase, sale, donation, exchange, marriage contract, testament, inheritance, or in any other manner whatever, without being subject to any taxes, imposts or charges whatever, other or higher than those which are or shall be levied on natives or on the subjects of the most favored state.

"They shall likewise be at liberty to export freely the proceeds of the sale of their property, and their goods in general, without being subjected to pay any other or higher duties than those payable under similar circumstances by natives or by the subjects of the most favored state."

APPENDIX B

Article III of the Treaty of Friendship and General Relations between the United States and Spain, signed at Madrid July 3, 1902.

33 STAT. 2105
Treaty Series 422
II Treaties (Malloy) 1701

"Where, on the death of any person holding real property (or property not personal), within the territories of one of the Contracting Parties, such real property would, by the laws of the land, pass to a citizen or subject of the other, were he not disqualified by the laws of the country where such real property is situated, such citizen or subject shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and to withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the citizens or subjects of the country from which such proceeds may be drawn.

"The citizens or subjects of each of the Contracting Parties shall have full power to dispose of their personal property within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees, and donees, being citizens or subjects of the other Contracting Party, whether resident or nonresident, shall succeed to their said personal property, and may take possession thereof either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the citizens or subjects of the country where the property lies, shall be liable to pay in like cases.

"In the event that the United States should grant to the citizens or subjects of a third Power the right to possess and preserve real estate in all the States, territories and dominions of the Union, Spanish subjects shall enjoy the same rights; and, in that case only, reciprocally, the citizens of the United States shall also enjoy the same rights in Spanish Dominions."

Article IX of the Treaty of Friendship, Commerce and Navigation between the United States and Argentina, signed at San Jose July 27, 1853.

10 STAT. 1005; 18 STAT. (pt. 2, Public Treaties) 16
Treaty Series 4
I Treaties (Malloy) 20

"In whatever relates to the police of the ports, the lading and unlading of ships, the safety of the merchandise, goods and effects, and to the acquiring and disposing of property of every sort and denomination, either by sale, donation, exchange, testament or in any other manner whatsoever, as also to the administration of justice, the citizens of the two contracting parties shall reciprocally enjoy the same privileges, liberties and rights, as native citizens; and they shall not be charged, in any of those respects, with any higher imposts or duties than those which are paid, or may be paid, by native citizens, submitting, of course, to the local laws and regulations of each country respectively. If any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the Consul-General or Consul of the nation to which the deceased belonged, or the representative of such Consul-General or Consul, in his absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs."

APPENDIX C

Convention regarding Legal Relations between Poland and the Kingdom of the Serbs, Croats and Slovenes, signed at Belgrade May 4, 1923.

85 League of Nations Treaty Series 455

English Translation of Article 23

"The nationals of either Contracting Pa ty shall be allowed, on the same conditions as nationals of the country to succeed to or take possession of property passing to them in the territory of the other Contracting Party by operation of law or in virtue of testamentary disposition."

APPENDIX D

Article V of the Agreement between the United States and the Federal Peoples Republic of Yugoslavia regarding pecuniary claims of the United States and its nationals, signed at Washington July 19, 1948.

62 STAT. 2133

"The Government of Yugoslavia agrees to accord to nationals of the United States lawfully continuing to hold, or hereafter acquiring assets in Yugoslavia, the rights and privileges of using and administering such assets and the income therefrom within the framework of the controls and regulation of the Government of Yugoslavia, on conditions not less favorable than the rights and privileges accorded to nationals of Yugoslavia, or of any other country, in accordance with the Convention of Commerce and Navigation between the United States of America and the Prince of Serbia, signed at Belgrade, October 2/14, 1881."

APPENDIX E

The International Monetary Fund Agreement, concluded at Bretton Woods July 22, 1944, and thereafter approved by the Governments of the United States and Yugoslavia.

59 STAT. 512

"ARTICLE VIII. GENERAL OBLIGATIONS OF MEMBERS"

"Sec. 2. *Avoidance of restrictions on current payments.*—

(a) Subject to the provisions of Article VII, Section 3(b), and Article XIV, Section 2, no member shall, without the approval of the Fund, impose restrictions on the making of payments and transfers for current international transactions.

(b) Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, co-operate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement."

"ARTICLE XIV. TRANSITIONAL PERIOD"

"Sec. 2. *Exchange restrictions.*—In the post-war transitional period members may, notwithstanding the provisions of any other articles of this Agreement, maintain and adapt to changing circumstances (and, in the case of members whose territories have been occupied by the enemy, introduce where necessary) restrictions on payments and transfers for current international transactions. Members shall, however, have continuous regard in their foreign exchange policies to the purposes of the Fund; and, as soon as conditions permit, they shall take all possible measures to develop such commercial and financial arrangements with other members as will facilitate international payments and the maintenance of exchange stability. In particular, members shall withdraw restrictions maintained or imposed under this Section as soon as they are satisfied that they will be able,

in the absence of such restrictions, to settle their balance of payments in a manner which will not unduly encumber their access to the resources of the fund."

"Sec. 4. *Action of the fund relating to restrictions.*—Not later than three years after the date on which the Fund begins operations and in each year thereafter, the Fund shall report on the restrictions still in force under Section 2 of this Article. Five years after the date on which the Fund begins operations, and in each year thereafter, any member still retaining any restrictions inconsistent with Article VIII, Sections 2, 3, or 4, shall consult the Fund as to their further retention. The Fund may, if it deems such action necessary in exceptional circumstances make representations to any member that conditions are favorable for the withdrawal of any particular restriction, or for the general abandonment of restrictions, inconsistent with the provisions of any other article of this Agreement. The member shall be given a suitable time to reply to such representations. If the Fund finds that the member persists in maintaining restrictions which are inconsistent with the purposes of the Fund, the member shall be subject to Article XV, Section 2(a)."

"ARTICLE XV. WITHDRAWAL FROM MEMBERSHIP"

"Sec. 2. *Compulsory withdrawal.*—(a) If a member fails to fulfill any of its obligations under this Agreement, the Fund may declare the member ineligible to use the resources of the Fund. Nothing in this Section shall be deemed to limit the provisions of Article IV, Section 6, Article V, Section 5, or Article VI, Section 1."

APPENDIX F

Section 259 of the California Probate Code, as of March 21, 1947, the date of decedent's death.

Ann. STATS. 1945
Ch. 1160

"The rights of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the right of aliens not residing in the United States or its territories to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents. It shall be presumed that such reciprocal rights exist and this presumption shall be conclusive unless prior to the hearing on any petition for distribution of all or a portion of such property to an alien heir, devisee or legatee not residing within the United States or its territories a petition is filed by any person interested in the estate requesting the court to find that either one or both of such reciprocal rights does not or do not exist as to the country of which such alien heir, devisee or legatee is resident. Upon the hearing of such petition the burden of establishing the nonexistence of such reciprocal right or rights shall be upon the petitioner. Notice of such hearing shall be given in the manner provided by Section 1200 of this code."

36

Office - Supreme Court, U
FILED
NOV 16 1953
HAROLD B. WILLEY, Cle

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

No. 344

JOHN ARBULICH, JR., *Petitioner,*

vs.

THOMAS ARBULICH, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

FRANK J. O'BRIEN,
68 Post Street, San Francisco 4, California,
Attorney for Respondent.

Subject Index

	Page
Statement of facts	1
I. Treaty of 1881 between United States and Serbia applies only to "citizens of the United States in Serbia and Serbian subjects in the United States	3
II. Treaty does not apply and other arguments are irrelevant	7
Conclusion	9

Table of Authorities Cited

Cases

	Pages
Artukovic v. Boyle, 107 Fed. Sup. 11	7
Clark v. Allen, 337 U.S. 503	5, 9

Constitutions

Constitution of the United States, Art. 2, Sec. 2, Clause 2	7

Miscellaneous

Treaty of Commerce Between the United States and Serbia entered into in 1881, Article II	3, 4

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

No. 344

JOHN ARBULICH, JR., *Petitioner,*

vs.

THOMAS ARBULICH, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

STATEMENT OF FACTS.

Charles J. Arbulich, a native of Yugoslavia and a naturalized citizen of the United States, died testate in the City and County of San Francisco, State of California, on March 21, 1947, and at the time of

his death he was a resident of the City and County of San Francisco. Under the terms of his last will and testament dated January 23, 1940, which was admitted to probate in the Superior Court of the State of California, in and for the City and County of San Francisco, he bequeathed all of his estate to his father, and in the event that his father predeceased him, he bequeathed all of his estate to his brother, John Arbulich, Jr., a resident and national of the Federal Peoples Republic of Yugoslavia. The father predeceased the testator. The decedent left as his sole heirs at law, two brothers, to wit, the said petitioner, John Arbulich, Jr., and the respondent, Thomas S. Arbulich, who is a resident of the State of California, and a naturalized citizen of the United States. Decedent's estate consisted of real and personal property, all of which was situated in the City and County of San Francisco.

A petition to determine heirship was filed by Thomas S. Arbulich and a similar petition was also filed by V. M. Vukmirovich, Consul General of the Federal Peoples Republic of Yugoslavia, on behalf of John Arbulich, Jr., although he had no power of attorney from John Arbulich, Jr., to represent him. The petitions were consolidated for hearing.

The trial Court rendered judgment pursuant to findings of fact and conclusions of law, decreeing that said John Arbulich, Jr., a citizen and national of Yugoslavia, does not have the right to take the real or personal property of said estate of said decedent,

and that Thomas S. Arbulich is entitled to succeed to, and have distributed to him, all of said estate.

The judgment of the trial Court was upheld by the Supreme Court of the State of California, and a petition for a writ of certiorari has been sought and the respondent submits this opposing brief.

I.

TREATY OF 1881 BETWEEN UNITED STATES AND SERBIA APPLIES ONLY TO "CITIZENS OF THE UNITED STATES IN SERBIA AND SERBIAN SUBJECTS IN THE UNITED STATES.

(a) The petition is based on the assumption that the treaty of commerce between the United States and Serbia entered into in 1881, is applicable to the facts in the Arbulich case.

This treaty was the only treaty introduced into evidence and Article II, the section relied upon, reads as follows:

> "In all that concerns the right of acquiring, or possessing or disposing of every kind of property, real or personal, *citizens of the United States in Serbia and Serbian subjects in the United States,* shall enjoy the rights which the respective laws grant or shall grant in each of these states to the subjects of the most favored nation.
>
> "*Within these limits,* and under the same conditions as the subjects of the most favored nation, they shall be at liberty to acquire and dispose of such property, whether by purchase, sale, donation, exchange, marriage contract, testament,

inheritance, or in any other manner whatever, without being subject to any taxes, imposts or charges whatever, other or higher than those which are or shall be levied on natives or on the subjects of the most favored state.

"They shall likewise be at liberty to export freely the proceeds of the sale of their property, and their goods in general, without being subject to pay any other or higher duties than those payable under similar circumstances by natives or by the subjects of the most favored state."

The emphasized language of the foregoing Article specifically refers to and limits the right of the treaty to

"Citizens of the United States *in Serbia* and Serbian subjects *in the United States.*"

Article II applies solely to that situation by further confining the issues by the words "*within these limits and under the same conditions* * * *." In the case at issue the decedent was a naturalized citizen of the United States and a resident of the State of California. His estate consisted of both real and personal property situated therein. The petitioner herein is a Yugoslav citizen residing in Yugoslavia. The situation of a citizen of the United States residing in the United States, or a citizen of Yugoslavia residing in Yugoslavia, disposing of his property by will or inheritance to a citizen or resident of the other, is not covered by this treaty.

The State Supreme Court in this connection ruled as follows:

"Appellant contends, nevertheless, that the provisions of article II of a treaty entered into in 1881 between the United States and the Kingdom of Serbia (of which the present Republic of Yugoslavia is the successor government) and certified by the Secretary of State of the United States as remaining in full force and effect between this country and Yugoslavia, are applicable and controlling in appellant's favor on the issue of reciprocity. It may be noted that the first paragraph of article II seemingly treats only of 'citizens of the United States in Serbia (Yugoslavia) and Serbian (Yugoslav) subjects in the United States,' rather than, as in the situation in the present case, of a United States citizen who dies in the United States and leaves property to a Yugoslav subject who is *in Yugoslavia,* and therefore is not here applicable." (R. pp. 177-178.)

(b) The opinion of the California Supreme Court is in accord with the decision of the United States Supreme Court in *Clark v. Allen,* 337 U.S. 503, when it interpreted a similar provision of the treaty between the United States and Germany.

The provisions of the German treaty in said case provided as follows:

"Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind *within the territories of the other,* by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may

take possession thereof, either by themselves, or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases."

The Court, at page 515, said:

"A practically identical provision of the Treaty of (April 10) 1844 with Wurtemberg, Art. III, 8 Stat. 588, 590, was before the Court in *Frederickson v. Louisiana*, 23 How. (US) 445, 16 L. Ed. 577. In that case the testator was a citizen of the United States, his legatees being citizens and residents of Wurttemberg, Louisiana, where the testator was domiciled, levied a succession tax of 10 per cent on legatees not domiciled in the United States. The Court held that the treaty did not cover the 'case of a citizen or subject of the respective countries residing at home, and disposing of property there in favor of a citizen or subject of the other * * *' pp. 447, 448. That decision was made in 1860. In 1917 the Court followed it in cases involving three other treaties. Peterson v. Iowa, 245 US 176, 62 L. Ed. 228, 38 S. Ct. 111; Skarderud v. Tax Commission, 245 US 633, 62 L. Ed. 522, 38 S. Ct. 133."

The Court, at page 516, said:

"We accordingly hold that Article IV of the treaty does not cover personalty located in this country and which an American citizen undertakes to leave to German nationals."

Another serious question arises in that our Senate did not confirm the action of our State Department in extending the treaty of 1881 between United States and Serbia to the Federal Peoples Republic of Yugoslavia, which has a different form of government, and includes different people and territory. See *Artukovic v. Boyle* (107 Fed. Sup. 11, Art. 2, Sec. 2, Clause 2, Constitution of the United States). It is not necessary to urge this point, because the terms of the treaty do not apply to the *Arbulich* case.

II.

TREATY DOES NOT APPLY AND OTHER ARGUMENTS ARE IRRELEVANT.

(a) The petitioner contends that the evidence given by the Yugoslav Ambassador was uncontradicted. This assertion is not true. The judgment of the trial Court and the opinion of the State Supreme Court are both based upon abundant evidence that is in conflict with the testimony of the Ambassador. In that connection the Supreme Court said:

> "Testimony by the Ambassador of Yugoslavia * * * serves at most to create a conflict in evidence as to the ultimate fact and is not controlling on the issue of reciprocity." (R. p. 178.)

(b) The judgment of the trial Court and the decision of the State Supreme Court are both based upon abundant evidence. Statements or inferences

in the petition to the contrary are unfounded. In this connection the State Supreme Court said:

> "Aside from the expression of opinion, a copy of the Yugoslav Constitution, as hereinabove mentioned, and copies of Yugoslav decrees governing transactions with foreign countries and their nationals were received in evidence without objection, and such Constitution and decrees in themselves support the finding of the trial court that reciprocity did not exist with respect to personal property * * *". (R. p. 179.)

After summarizing the documentary evidence included in four exhibits, the Supreme Court said:

> "It is apparent that the evidence summarized hereinabove is sufficient to support a finding that on the date of decedent's death in 1947 reciprocal rights did not exist with respect to real property.' (R. p. 176.)

(c) The only treaty offered in evidence was the treaty with Serbia, which has been mentioned heretofore. The other treaties mentioned in the petition were not even mentioned during the trial and the Bretton Woods Agreement was mentioned for the first time in a petition for rehearing by the petitioner herein after the State Supreme Court had decided the case.

Such matters, one based on conflicting evidence, and the other not raised until after the State Supreme Court rendered its decision, should not be considered by this Court.

CONCLUSION.

I respectfully submit that the petition for a writ of certiorari herein is based upon petitioner's interpretation of a treaty that is not in harmony with this Court's interpretation of a similar treaty in *Clark v. Allen, supra,* upon treaties not introduced into evidence or relied upon during the trial, upon evidence which served at most to create a conflict, and upon issues not presented or relied upon prior to the decision of the California Supreme Court. Under the law and the rules of this court, the petition should be denied.

Dated, San Francisco, California,
November 16, 1953.

Respectfully submitted,
FRANK J. O'BRIEN,
Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 344

JOHN ARBULICH, JR.,

Petitioner,

vs.

THOMAS ARBULICH

REPLY BRIEF

I

It is most significant that respondent makes no effort to support the decision of the California Supreme Court on the basis of its *ratio decidendi* but instead attempts to resist review on a ground not embodied in a finding by any of the California courts which passed upon the case. The California Supreme Court said, in this connection, only that:

> "It may be noted that the first paragraph of article II *seemingly* treats only of citizens of the United States in Serbia (Yugoslavia) and Serbian (Yugoslav) subjects in the United States * * * and therefore is not here applicable." (Emphasis supplied)

The court did not consider whether its admittedly superficial reading of the treaty was correct as a matter of con-

struction because of its decision that the treaty, even assuming its applicability, was irrelevant since its "provisions do not establish the reciprocal rights ~~granted~~ required by the Probate Code." This decision that the treaty is subordinate to state law, which respondent does not even purport to justify, is, of course, what the California ruling will stand for if it is not subjected to review by this Court.

We feel it would be an undue imposition on the Court if we were to elaborate in this reply the considerations which we merely touched on in our principal brief concerning the correct interpretation of the treaty in the light of its consistent practical construction by both parties. We need only point out here that this question of construction has not in fact been passed upon heretofore and is clearly not the basis of the decisions below. That it certainly is not controlled by the explicitly reluctant decision of this Court in *Clark* v. *Allen* we have indicated in our principal brief.

II

Respondent asserts in his Point II(a) that the California Courts merely chose between conflicting evidence in refusing to give effect to the official opinions of the Yugoslav Ambassador, and presumably the Minister of Justice, relying on an excerpt from the opinion of the California Supreme Court. His Point II(b), however, quoting further excerpts from the opinion, itself demonstrates that the Court in the face of the interpretation by the qualified Yugoslav officials relied rather upon its own interpretation of the Yugoslav Constitution and Decrees and its own assumption that these would be paramount in Yugoslav law to the Yugoslav interpretation of its treaty obligations. This is exactly the type of error corrected by this Court in the *Pink* case (Petitioner's Brief, pps. 18-19).

As to respondent's Point II(c), we have pointed out that the attention of the California Courts was called to the

treaties of both the United States and Yugoslavia with their most favored nations (Petitioner's brief, pp. 8-9). That they were made the subjects of judicial notice rather than being introduced in evidence is, of course, irrelevant.

Finally, although we do not regard it as important, respondent is technically incorrect in stating that the Bretton Woods Agreement was mentioned for the first time in the petition for rehearing before the California Supreme Court, since it was adverted to in connection with the general discussion of the irrelevance of foreign exchange controls in petitioner's original brief before that Court (R., p. 167). What *is* important is that the Agreement was not stressed until the petition for rehearing solely because of the fact that it was impossible to anticipate that the California Supreme Court would ignore not only the consistent line of California decisions holding foreign exchange controls irrelevant in determining rights of inheritance but also the action of the legislature in repealing the only portion of the California Code which made the question even arguable. As was said in *Herndon* v. *Georgia,* 295 U. S. 440 at page 444:

> "There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raisng it."

Respectfully submitted,

LAURENCE S. LESSER,
SIDNEY H. WILLNER,
PETER A. SCHWABE,
EMMET B. HAYES,
Attorneys for Petitioners.

NOVEMBER 27, 1953.